Supreme Court, U. S.
FILED
DEC 14 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1977
NO. 77-525

DOUGLAS SPICER

APPELLANT

VS.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, doing business as "MEDICAL COLLEGE OF ALABAMA" and "UNIVERSITY OF ALABAMA SCHOOL OF MEDICINE," a Constitutional Corporation, et al.

APPELLEES.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA

MOTION TO DISMISS APPEAL

Ina Leonard
112 Mortimer Jordan Hall
University Station
Birmingham, Alabama 35203

Attorney for Appellees

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1977
NO. 77-525

DOUGLAS SPICER

APPELLANT

VS.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, doing business as "MEDICAL COLLEGE OF ALABAMA" and "UNIVERSITY OF ALABAMA SCHOOL OF MEDICINE," a Constitutional Corporation, J. RUFUS BEALLE, WINTON M. BLOUNT, W. PAUL BRANN, ALBERT BREWER, LEROY BROWN, JOHN A. CADDELL, EHNEY A. CAMP, JR., SAMUEL EARLE G. HOBBS, WILLIAM H. KEY, THOMAS S. LAWSON, DANIEL T. McCALL, JR., JOHN T. OLIVER, JR., ERIS F. PAUL, THOMAS D. RUSSELL, YETTA G. SAMFORD, JR., ERNEST STONE, ERNEST G. WILLIAMS, and their successors and assigns, individually and in their official capacities, jointly and severally,

APPELLEES.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA

MOTION TO DISMISS APPEAL

MOTION TO DISMISS APPEAL

Appellees move the Court to dismiss the appeal herein on the following grounds:

1. The Court is without jurisdiction because appellant's suit did not draw into question the validity of Art. 1, §14 of the Alabama Constitution of 1901 as required by 28 USC §1257(2).

2. The question of whether a state court may refuse to consider federal constitutional claims against a State because of the sovereign immunity of the State provided in the state constitution was not properly presented in the state courts.

3. There existed an adequate state ground for dismissal of the suit appealed herein.

STATEMENT

Appellant filed suit in the District Court of Jefferson County, Alabama, against The Board of Trustees of the University of Alabama, a corporation, and seventeen individual officers and members of the board of trustees of the corporation on June 1, 1976, alleging that the denial of his request for admission to medical school was a deprivation of equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. The corporation filed a motion to dismiss the complaint on the grounds that it was a suit against the state of Alabama barred by the constitution and law thereof and that each and every count thereof was barred by the applicable statute of limitations. Individual appellees moved for dismissal of the

federal claims against them on the grounds that they were barred by the applicable statute of limitations and by the dismissal of a complaint arising from the same set of facts, alleging substantially the same cause of action, although naming as defendants different agents of the corporate defendant, by the United States District Court for the Northern District of Alabama, a court of concurrent jurisdiction. Motions to dismiss were granted, the complaint being dismissed as to all appellees. A motion by appellant for reconsideration of the judgment was denied by the circuit court. The Supreme Court of Alabama affirmed the judgment of the circuit court, and this case is now on direct appeal from that judgment to this Court.

ARGUMENT

1. This case is not within the appeal jurisdiction of this Court.

For jurisdiction of this appeal appellant relies upon 28 USC §1257(2), asserting that the validity of Art. 1, §14 of the Alabama Constitution (1901) has been drawn into question as repugnant to the Constitution of the United States and that the validity of the state provision was upheld. (J.S. 1.) While it is difficult to isolate the requirement of the validity of a state statute having been "drawn into question" from the issues of whether questions have been properly raised, it should be emphasized that the validity of the Art. 1, §14 of the Alabama Constitution was never drawn into question by explicit protest of appellant that reliance on that state constitutional provision, resulting in an affirmation of the dismissal of the suit, was prohibited by the supremacy clause of the federal constitution or any other federal law.

2. The Question Which the Appellant Seeks to Have Reviewed was not Properly Raised and Preserved in the Proceedings Below.

Appellant lists four questions for review in the Jurisdictional Statement. (J.S. 2.) However, all but the first are questions concerning the merits of appellant's case, which have never been reached by the state courts, as is clearly established by the fact that the suit was dismissed upon motions of appellees and that said dismissal was affirmed by the Supreme Court of Alabama. Any review and decision by this Court on those questions, absent factual development and judgment thereon in a hearing on the merits, would constitute an advisory opinion by this Court.

Should this Court note jurisdiction in this case, the one question presented for review is: May a state court refuse to consider a claim that a state university rule is repugnant to the U.S. Constitution because of a state constitutional provision prohibiting suits against the State? It is not at all clear from the opinion of the Supreme Court of Alabama that the court affirmed the dismissal of appellant's federal claims on the basis of the state constitutional provision. An examination of the cases cited in the opinion of the Supreme Court of Alabama (J.S. 1a) shows that those cases stand primarily for the proposition that state universities in Alabama are protected by the sovereign immunity of the state. Appellant's complaint alleged several state and federal causes of action. (J.S. 4.) Appellees' motions to dismiss stated several grounds for dismissal, including that the complaint was barred by the applicable statutes of limitation. (J.S. 4.) It is quite possible that the ground stated for affirming the dismissal ran only to

the state claims. It is certain that the dismissal of the claims against the individual defendants was not based on the sovereign immunity of the state, as such a claim was not available to those individuals and was not raised by them.

Presentation of the federal question in a manner requiring decision in the state courts is essential to sustain jurisdiction of this appeal. Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). Further, when the highest state court has not delivered an opinion on the federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 580 (1969). Appellant does not assert that the federal question was raised in the trial court. The Motion to Reconsider the Judgment, filed after the sovereign immunity bar had been raised, failed to raise the federal question. Appellant states only that the non-applicability of the state's sovereign immunity to a federal cause of action was briefed and argued to the Supreme Court of Alabama. (J.S. 5.) In fact, the question presented in appellant's brief was: Is a claim against the University of Alabama Board of Trustees for declaratory relief barred by the Alabama Constitution? The argument on that question was entitled: Insofar as the complaint demands equitable relief against the defendant corporation, it is not a claim against the State forbidden by the Constitution of Alabama. Appellees contend that the question of whether the reliance on a state constitutional provision to refuse consideration of federal claims in state court is itself repugnant to the federal constitution was raised for the first time in the appeal to this Court, and the appeal should not lie. Cardinale v. State of Louisiana, 394 U.S. 437 (1969).

3. There was an adequate state ground for dismissal of appellant's complaint.

As the opinion of the Supreme Court of Alabama refers only to cases concerning the sovereign immunity of state colleges and universities, one might infer that dismissal of the federal claims against the state rested on that principle. That inference is not permissible, however, with regard to the claims against the individual appellees, as they did not raise sovereign immunity as a ground for dismissal.

Appellees contend that one ground relied upon by the individuals and the corporation, the bar to suit created by the applicable statute of limitations, was sufficient to require dismissal. Appellant was refused admission to medical school in 1969 and 1970. (J.S. 3,4.) Suit, alleging that those rejections violated appellant's rights to equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, was filed in 1976. In Alabama actions for "injury to the person or rights of another not arising from contract and not specifically enumerated ..." must be commenced within one year. Code of Ala. 1975, §6-239(5). It has been held consistently by the federal courts in Alabama, where federal constitutional claims are usually heard, that actions for deprivation of civil rights are subject to the general one-year statute of limitations in Alabama. Boshell v. Alabama Mental Health Board, 473 F.2d 1369 (5th Cir. 1973); Beard v. Stevens, 372 F.2d 685 (5th Cir. 1967); Ripps v. Dobbs House, Inc., 366 F.Supp. 205 (N.D. Ala. 1973).

While appellees cannot urge with certainty that the state courts relied on this ground and disposed of the federal claims accordingly, the clear existence of the statute of limitations bar permits such an inference, which is more logical, particularly in reference to claims against the individual appellees, than is one that the Supreme Court of Alabama relied solely on the sovereign immunity of the state to support dismissal of all claims by appellant.

CONCLUSION

For the foregoing reasons, the appeal herein should be dismissed.

Respectfully submitted,

Ina Leonard
112 Mortimer Jordan Hall
University Station
Birmingham, Alabama 35294

December, 1977.